In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-590

D. B. ANDERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A1-A5) is reported at 462 F.2d 1147.

JURISDICTION

The judgment of the Court of Claims was entered on July 14, 1972. The petition for a writ of certiorari was filed on October 12, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims erred in holding that, upon a sale of corporate assets preceding a complete liquidation under Section 337 of the Internal Revenue Code, the amount received for rental items, the cost of which had previously been deducted from ordinary income, is taxable as ordinary income under the tax benefit rule.

2. Whether it was appropriate for the Court of Claims to grant the government's motion for summary judgment in the circumstances of this case.

STATUTES, REGULATIONS AND RULES INVOLVED

The pertinent provisions of Section 337 of the Internal Revenue Code of 1954, Section 1.337-3 of the Treasury Regulations on Income Tax (1954 Code), and Rule 101 of the Rules of the United States Court of Claims (Rev. 1969), are set forth in the Appendix, *infra*, pp. 9-12.

STATEMENT

This case involves a claim for the refund of federal corporate income taxes paid by petitioner as transferee upon liquidation of the assets of Service Industrial Cleaners, Inc. (Service). Service was a Missouri corporation engaged in the business of providing a rental service of laundered towels, seat covers, fender covers, wiping materials, and other textiles and apparels. It also carried on a general cleaning and laundering business of similar items. (Pet. App. A1).

For federal income tax purposes, Service charged the full cost of these rental items to its expense accounts at the time of acquisition. At the end of the tax year, the expense accounts were credited with the cost of items not yet placed in service, with the result that Service obtained current deductions for all rental items that had been placed in service during the year. (Pet. App. A2).

On May 12, 1961, Service's directors and stockholders passed resolutions approving the terms of a sale of the corporation's assets and adopting a plan of complete liquidation pursuant to Section 337 of the Internal Revenue Code of 1954. On May 22 and 23, 1961, Service sold substantially all of its assets, including the rental items that had been placed in service. The terms of the sale specifically provided that the used rental items, which still had remaining serviceable life, were sold for a consideration of $117,000. Pursuant to the plan of liquidation, Service distributed all of its assets to the petitioner within 12 months after the plan of complete liquidation was adopted. Service was dissolved in March, 1962. (Pet. App. A2-A3.)

On its federal income tax returns for the fiscal year ended July 31, 1961, Service reported a gain of $163,002.24 from the sale of its assets, and claimed nonrecognition of this gain under Section 337. This gain included the $117,000 received for the rental items that had been placed in service, and whose cost had already been deducted from ordinary income. (Pet. App. A3.) Upon audit, the Internal Revenue

Service ruled that the $117,000 should be taxed as ordinary income under the tax benefit rule since the cost of the rental items had been charged to expense upon purchase and deducted; accordingly, the Commissioner determined a deficiency which was paid by petitioner as transferee of Service's assets.

In plaintiff's pretrial submission in the Court of Claims (Pet. App. A26-A34), these facts were characterized by petitioner as (Pet. App. A28) "matters of fact about which it is believed that there is no substantial controversy." Based on the pleadings and petitioner's submission of August 5, 1971, the government filed a motion for summary judgment on December 14, 1971. (Pet. App. A35.) In his response to this motion for summary judgment, petitioner stated (Pet. App. A55) that he did "not dispute the evidentiary matters set out in the Statement (of Facts) appearing in Defendant's Brief," but nonetheless, opposed the motion for summary judgment on the basis that genuine issues of ultimate fact and conclusions of law existed. These issues included (1) whether the rental items were "property" within the meaning of Section 337(b)(1) of the Code; (2) whether the transfer of such items on May 22 and 23, 1961, was a "sale or exchange" within the meaning of Section 337(a) of the Code; and (3) if gains from the sale of the rental items did constitute gains from the sale of property within the meaning of Section 337, whether the tax benefit rule prevented such gains from qualifying for nonrecognition pursuant to Section 337.

The Court of Claims granted the government's motion for summary judgment. With respect to petitioner's issues of ultimate fact and conclusions of law, the court held that (1) the rental items were "property" within the meaning of Section 337(b)(1); (2) the transfer was a "sale"; but (3) the tax benefit rule did prevent the gain from qualifying for nonrecognition pursuant to Section 337.

ARGUMENT

The decision of the Court of Claims is correct. There is no conflict of decisions or any other reason for further review by this Court.

1. Aside from petitioner's procedural argument concerning the granting of the government's motion for summary judgment, this case is identical in all relevant respects to *Anders* v. *Commissioner*, 48 T.C. 815, reversed, 414 F. 2d 1283 (C.A. 10), certiorari denied, 396 U.S. 958. That case also involved the instant petitioner's liability, as transferee, for taxes due from a corporation whose name was Service Industrial Cleaners, Inc. Whereas the corporation in this case engaged in renting laundered towels, etc., in Kansas City, Missouri, the corporation in the first *Anders* case engaged in the same business in Kansas City, Kansas. At the same time (May, 1961) that the corporate assets in this case were sold and the corporation liquidated pursuant to Section 337, the assets of the Kansas corporation were sold to the same purchasers, and the corporation was liquidated pursuant to Section 337. (Pet. App. A29; 48 T.C.,

pp. 817-818). The Tenth Circuit, like the court below here, held that the tax benefit rule required taxpayer to report as ordinary income proceeds received for the rental items whose cost had been fully expensed and deducted from ordinary income.

We oppose certiorari in this case for the same reasons set forth in our brief in opposition to certiorari in the first *Anders* case, to which we refer the Court.[1] As we pointed out in that brief with respect to the Tenth Circuit's opinion, the decision below follows other cases recognizing that the policy of the tax benefit rule[2] is applicable to a liquidating corporation, notwithstanding the corporation's qualification under the nonrecognition of gain provisions of Section 337. *West Seattle National Bank of Seattle* v. *Commissioner*, 288 F. 2d 47 (C.A. 9); *Citizens Federal S. & L. Ass'n of Cleveland* v. *United States*, 290 F. 2d 932 (Ct. Cl.). Since the time this Court denied certiorari in the first *Anders* case, other courts have continued to hold that the tax benefit rule applies in the context of Section 337 liquidations. *Citizens Acceptance Corp.* v. *United States*, 462 F. 2d 751 (C.A. 3); *Connery* v. *United States*, 460 F. 2d 1130

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[1] A copy of this brief is being served on petitioner's counsel.

[2] As applied by this Court, the policy of the tax benefit rule is that, if an item previously has served to offset taxable income, its recoupment should be treated as a recovery of income. *United States* v. *Skelly Oil Co.*, 394 U.S. 678, 686, n. 5; *Alice Phelan Sullivan Corp.* v. *United States*, 381 F. 2d 399, 401-403 (Ct. Cl.); *O'Meara* v. *Commissioner*, 8 T.C. 622, 634-635.

(C.A. 3); *Spitalny* v. *United States*, 430 F. 2d 195 (C.A. 9); *S. E. Evans, Inc.* v. *United States*, 317 F. Supp. 423 (W.D. Ark.); *Bishop* v. *United States*, 324 F. Supp. 1105 (M.D. Ga.). Petitioner cites no decision to the contrary, and we are unaware of any such decision.

2. Petitioner also asserts (Pet. 8-12), as a basis for certiorari, that it was error for the Court of Claims to grant the government's motion for summary judgment because of the need for additional findings of fact regarding the cost to Service of the rental items that were sold for $117,000. Petitioner points out (Pet. 10) that, if the cost of these rental items were less than $117,000, only this smaller cost would have been expensed and deducted from ordinary income and only this smaller amount would be restored to income under the tax benefit rule. To the extent that the $117,000 received for the rental items exceeded the smaller cost figure, the excess would be nonrecognized gain under Section 337. At no point during the proceedings below, however—either in the pleadings, petitioner's pretrial submission (in which he was required by Court of Claims Rule 111, to state contentions of fact as well as facts which were not disputed), or petitioner's response to the motion for summary judgment—did petitioner ever suggest or allege that the cost of the rental items to Service was less than $117,000. Nor did petitioner ever argue, in the alternative, that he was entitled to a partial refund for this reason. Indeed, even in his petition to this Court, petitioner still has not affirmatively al-

leged that this cost figure is in dispute or that it was less than $117,000. He merely states that the Court of Claims made no findings in this regard. In the absence of some allegation on the part of petitioner, the Court of Claims was entitled to assume that the used rental items were sold for less than their original cost.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[3] In this regard, we point out that in the first *Anders* case, the record showed (48 T.C., p. 817) that the new rental items that had not yet been put in service or expensed were sold at cost to the purchasers. It is most unlikely that the rental items that had been put in use and expensed were sold for more than cost.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 337. GAIN OR LOSS ON SALES OR EXCHANGES IN CONNECTION WITH CERTAIN LIQUIDATIONS.

(a) *General Rule.*—If—

(1) a corporation adopts a plan of complete liquidation on or after June 22, 1954, and

(2) within the 12-month period beginning on the date of the adoption of such plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims,

then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period.

(b) *Property Defined.*—

(1) *In general.*—For the purposes of subsection (a), the term "property" does not include—

(A) stock in trade of the corporation, or other property of a kind which would properly be included in the inventory of the corporation if on hand at the close of the taxable year, and property held by the corporation primarily for sale to customers in the ordinary course of its trade or business,

(B) installment obligations acquired in respect of the sale or exchange (without regard to whether such sale or exchange occurred before, on, or after the date of the adoption of the plan referred to in subsection (a)) of stock

in trade or other property described in subparagraph (A) of this paragraph, and

(C) installment obligations acquired in respect of property (other than property described in subparagraph (A)) sold or exchanged before the date of the adoption of such plan of liquidation.

(2) *Nonrecognition with respect to inventory in certain cases.*—Notwithstanding paragraph (1) of this subsection, if substantially all of the property described in subparagraph (A) of such paragraph (1) which is attributable to a trade or business of the corporation is, in accordance with this section, sold or exchanged to one person in one transaction, then for purposes of subsection (a) the term "property" includes—

(A) such property so sold or exchanged, and

(B) installment obligations acquired in respect of such sale or exchange.

* * * *

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§ 1.337-3 *Property defined.*

(a) Except as provided in section 337(b)(2) and this section, the term "property" as used in section 337(a) and § 1.337-1 does not include, (1) stock in trade of the corporation, or other property of a kind which would properly be included in the inventory of the corporation if on hand at the close of the taxable year and property held by the corporation primarily for sale to

customers in the ordinary course of its trade or business (hereinafter for purposes of section 337 referred to as "inventory"), (2) installment obligations acquired at any time from the sale or exchange of inventory, or (3) installment obligations acquired from the sale or exchange of property (other than inventory) prior to the adoption of the plan of liquidation. With the exceptions listed in this paragraph, the term "property" includes all assets owned by a corporation.

(b) Except as provided in paragraph (c) of this section, if substantially all of the inventory is sold or exchanged to one person in one transaction, then for the purpose of section 337(a) the term "property" shall include:

(1) The inventory so sold or exchanged, and
(2) Installment obligations acquired in such sale or exchange.

For this purpose, the term "substantially all" means substantially all of the inventory at the time of the sale and includes inventory subject to liabilities, specific or otherwise. Section 337 (b)(2) shall be inapplicable if the inventory so sold is replaced by like inventory, or by a new kind of inventory.

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Rules of the United States Court of Claims (Rev. 1969):

Rule 101. SUMMARY JUDGMENT.

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(b) *For Defending Party:* Subject to the provisions of paragraph (c) of this rule, a party

against whom a claim or counterclaim is asserted may at any time move with or without supporting affidavits for summary judgment in his favor as to all or any part thereof.

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